FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

ACCESS ONE TRANSPORT, INC., *Complainant* v. COSCO SHIPPING LINES CO. LTD., *Respondent.*	**DOCKET NO. 24-13**

Served: June 4, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

ORDER DENYING PARTIAL MOTION TO DISMISS

I. Introduction

On April 8, 2024, Respondent COSCO Shipping Lines Co. Ltd. ("COSCO") filed a motion for partial dismissal ("Motion"). On May 7, 2024, Complainant Access One Transport, Inc. ("Access One") timely filed its response to Respondent's motion to dismiss ("Opposition"). On May 14, 2024, COSCO filed its reply in support of the motion ("Reply").

The Ocean Shipping Reform Act of 2022 ("OSRA 2022") was enacted on June 16, 2022. COSCO, an ocean common carrier, seeks to dismiss specific allegations for failure to state a claim, arguing that pre-OSRA 2022 section 41104(a)(3) applied to retaliation against shippers and both pre- and post-OSRA 2022 section 41104(a)(3) should be dismissed because the complaint does not allege that Complainant is a shipper or allege any retaliation. Motion at 1-2. COSCO also seeks to dismiss the section 41104(a)(8) allegation, arguing that both pre- and post-OSRA 2022 applied to service pursuant to a tariff and COSCO did not provide any service to Access One, much less pursuant to a tariff. Motion at 1-2.

Access One, a motor carrier, asserts that the Shipping Act is violated by the practice of requiring dual transactions, where the motor carrier must pick up a full container at the same time it drops off an empty container. Opposition at 2-3. Access One asserts that dual transactions result in an unreasonable preference and impose an unreasonable disadvantage; COSCO's detention rules and charges are found in its tariff; and Access One has sufficiently alleged a claim for both pre- and post-OSRA 2022 versions of 46 U.S.C. § 41104(a)(3). Opposition at 3-9.

The complaint focuses on the section 41102(c) allegations and briefly alleges "an unreasonable preference or practice per 46 U.S.C. §41104(a)(3) and (8) [which] are independent violations of the Act," and that "requiring a dual transaction to return an empty . . . constitutes an unreasonable preference or practice per 46 U.S.C. §41104(a)(3) and (8) and thus is an independent violation of the Act." Complaint at 2, 8-9.

As explained below, COSCO's motion is denied. At this early stage of the proceeding, no discovery has been conducted. Because this is a motion to dismiss, the facts alleged in the complaint must be accepted as true. Therefore, this decision does not address the merits of the complaint but merely finds that the complaint alleges a plausible claim so that the case may proceed. The motion does not seek to dismiss the alleged section 41102(c) violation and this order does not address that allegation.

Respondent shall file its answer by June 18, 2024, and the parties should file a joint status report with a proposed schedule as required by the initial order by July 2, 2024.

II. Motion to Dismiss Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. Federal Rule of Civil Procedure 12(b) permits a party to raise, by motion, lack of subject matter jurisdiction (12(b)(1)), lack of personal jurisdiction (12(b)(2)), and failure to state a claim (12(b)(6)). F.R.C.P. 12.

"Under Fed. R. Civ. P. 12 (b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor." *MAVL Capital*, 2020 WL 13512925, at *5 (citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 2015 WL 9426189, at *12 (FMC Dec. 18, 2015)).

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 663] (2009).

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., Docket No. 09-01, 32 S.R.R. 126, 136, 2011 WL 7144008, at *12 (FMC Aug. 1, 2011). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The focus at this stage is not with whether a complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co.*, 2014 WL 4411676, at *2 (M.D. Tenn. 2014).

III. Analysis

A. Section 41104(a)(3)

COSCO contends that the complaint does not allege that Complainant was a shipper or that there was retaliation as required pre-OSRA and Complainant does not allege that it was

refused cargo space or other unfair or discriminatory methods as required post-OSRA for section 41104(a)(3). Motion at 3-5. Access One asserts that the complaint sufficiently alleges that "[d]ual moves are by their very nature unjust and unfair, because COSCO is unfairly penalizing Access for patronizing another carrier," which is sufficient to support a pre-OSRA claim; and that it has alleged violations post-OSRA and that dual requirements are alleged to be unfair and unjust. Opposition at 6-9.

Section 41104(a)(3) currently states: "A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not- . . . unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods." 46 U.S.C. § 41104(a)(3). Prior to OSRA-2022, this section stated:

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not- . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.

46 U.S.C. § 41104(a)(3).

The complaint alleges that requiring dual transactions to return empty containers is an unreasonable preference or practice. Complaint at 2, 8. The complaint does not mention a refusal of cargo space accommodations, so it appears that Access One is relying on the prohibition against "resort[ing] to other unfair or unjustly discriminatory methods."

COSCO argues that Access One does not allege a "resort to any other unfair or unjustly discriminatory methods;" does not "allege that any other drayage provider received more favorable treatment;" and this section refers "only to actions regarding cargo space." Motion at 5. Access One responds, arguing:

> Dual moves are by their very nature unjust and unfair, because COSCO is unfairly penalizing Access for patronizing another carrier. COSCO and its terminals, by refusing to accept the return of empty containers unless there is a corresponding full container pick up at that terminal, is in effect unjustly and unfairly discriminating for the lack of additional shipments by COSCO or through COSCO's terminal. If a full container pick up was available at another terminal on behalf of another carrier, Access would have to forgo returning the empty container. Clearly that is a form of unjust and unfair discrimination for patronizing another carrier.

Opposition at 9.

Current section 41104(a)(3) does not indicate that it is limited to allegations of a refusal of cargo space accommodations. Rather it refers to discriminatory methods and that those methods were unfair or unjust. While the complaint does not explicitly refer to discriminatory methods, it does allege an unreasonable preference or practice, essentially that certain parties were treated better than others. The opposition further develops the argument, contending that requiring a dual transaction to return an empty container treats those who can pick up a load

differently from those who cannot. In addition, the complaint describes the dual transaction requirement as unreasonable and details the harms it alleges from the practice. Complaint at 2, 8-9. At this early stage of the proceeding, this is sufficient to plausibly allege discriminatory methods and that those methods were unfair or unjust. Therefore, the complaint plausibly alleges a claim for post-OSRA section 41104(a)(3).

Pre-OSRA section 41104(a)(3) applies to retaliation against a shipper and resort to other unfair or unjust discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason. Thus, this section has additional elements that must be pled.

First, COSCO asserts that "Complainant does not (and cannot) allege that it was a shipper, as expressly required by the statute." Motion at 4. Access One "concedes that as a motor carrier, it is not in and of itself a 'shipper' of the cargo," but argues that the term shipper is not so limited. Opposition at 8.

The Commission issued a Statement on Retaliation in 2021, which discusses the history and application of section 41104(a)(3) at that time (pre-OSRA 2022). The Commission stated that "shipper" would be defined broadly; section 41104(a)(3) "applies only to prohibited conduct *directed* at a 'shipper;'" and that the term shipper means "a cargo owner, the person for whose account the ocean transportation of cargo is provided, the person to whom delivery is to be made, a shippers' association, or a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract." Statement on Retaliation, Docket No. 21-14, 2021 WL 6202673 (FMC Dec. 28, 2021), at *4. "Although the protected entities under § 41104(a)(3) are shippers, this does not mean one must necessarily be a shipper to file a complaint alleging a violation. Any person may file a complaint alleging a violation of Title 46, Subtitle IV, Part A." Statement on Retaliation, 2021 WL 6202673, at *4 n.34 (citing 46 U.S.C. § 41301(a)).

This section prohibits retaliation "against a shipper" but it does not require that the shipper bring the claim. Given the Commission's guidance in the Statement on Retaliation, the complaint is sufficient to plausibly allege that any retaliation was against a shipper.

Next, COSCO asserts that the complaint does not plead that there was retaliation or, if so, that it was for a prohibited reason. Motion at 4. Access One asserts that dual moves unfairly penalize it "for patronizing another carrier." Opposition at 9. COSCO contends that dual transaction requirements "are determined entirely by the terminals" and that "a motor carrier may return an empty container to one ocean carrier and pick up a full container transported by a different ocean carrier." Reply at 1, n.1.

The statute requires that the retaliation be "because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." Motion at 4. While there may be many reasons why a carrier may require dual transactions to return empty containers or other factual issues, the complaint clearly alleges that in this case, the reason was to penalize those who patronized other carriers and therefore did not have a shipment to pick up when it wanted to drop off the empty container. Viewing the complaint and inferences in favor of Complainant, this is sufficient to plausibly allege that any retaliation was for a prohibited reason.

The allegation that COSCO resorted to other unfair or unjustly discriminatory methods is addressed above and found plausibly alleged for the same reasons. Therefore, the complaint is sufficiently detailed to raise a plausible violation of section 41104(a)(3), both pre- and post-OSRA 2022, which is sufficient at this stage of the proceeding. Complainant will need to prove the allegations of its complaint. And, in briefing after discovery, Respondent may address whether this section applies to these facts.

B. Section 41104(a)(8)

COSCO contends that both before and after OSRA, section 41104(a)(8) applied to service pursuant to a tariff and that the complaint does not allege that COSCO provided service to Access One or that any service was provided pursuant to a tariff and that Access One does not allege any facts supporting the claim that it was subject to any undue preference. Motion at 5-6. Access One asserts that "a dual transaction is by its own nature is obviously preferential in nature" and that the complaint includes allegations related to detention rates which were included in COSCO's tariff. Opposition at 5-6.

Section 41104(a)(8) states: "A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not- . . . for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage." 46 U.S.C. §41104(a)(8). This section was not changed by OSRA 2022.

The complaint does not allege that the shipments at issue were transported pursuant to a tariff. Rather, it refers to the Uniform Intermodal Interchange and Facilities Access Agreement and states that "COSCO may have further agreements directly with shippers, consignees, beneficial cargo owners or other parties which extend the amount of free time allowed or that may change the amount of detention charged on a daily basis." Complaint at 3.

Access One argues that detention rates were imposed pursuant to COSCO's tariff and attaches a copy of COSCO's tariff which lists detention charges and states that "Detention (Per-Diem) charges in U.S.A. shall be collected through trucker, covered under our interchange agreement with the trucker." Opposition at 6, 13 (Exhibit A). The tariff also states that "Free time at all U.S. locations for *cargo moving under service contract or tariff* rates shall apply to containers only and shall not apply to chassis." *Id.* (emphasis added). COSCO asserts that "Access One, when not benefiting from a shipper's service contract, is subject to the COSCO tariff on free time and per diem, which necessarily applies to everyone alike." Reply at 3.

The first question is whether COSCO's tariff can be considered without converting this motion to dismiss to a motion for summary decision. Such supplementary material may be considered where it "is referred to in the complaint and is central to plaintiff's claim," without converting the motion to one for summary judgment." *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 186 (D.D.C. 2001) (citations omitted). Here, COSCO's tariff imposing demurrage charges is central to Access One's claim and may be considered without converting the motion.

Although the complaint does not allege which shipments moved pursuant to the tariff, it refers to the detention rates that are imposed by COSCO and pursuant to the Uniform Intermodal Interchange and Facilities Access Agreement. Complaint at 3. This may be the same

"interchange agreement with the trucker" referred to in the tariff. Thus, reviewing the complaint in the light most favorable to Complainant, the detention charges may have been imposed pursuant to COSCO's tariff. Or, at least some of the detention charges may have been imposed by tariff, including any service contracts that refer to COSCO's detention rates listed in its tariff.

Discovery will shed additional light on whether or not the detention charges at issue were for "for service pursuant to a tariff." At this point, the section 41104(a)(8) claim is plausibly pled. In discovery, parties will need to consider whether service pursuant to a tariff needs to be individually shown for each shipment for which reparations are sought.

C. Next Steps

The parties should discuss options for handling this proceeding expeditiously. Access One does not identify the number of shipments at issue but it appears that there may be many. The complaint alleges that Access One "would have been able to return containers to COSCO during free time but for COSCO and its terminal's actions." There is not a *per se* prohibition on dual transactions and it seems likely that Access One would need to establish an inability to return each container for which it seeks damages. *See Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC-Possible Violations of 46 U.S.C. § 41102(c),* Docket No. 21-09, 4 F.M.C.2d 53 2022 WL 3093193 (ALJ April 22, 2022) (enforcement proceeding imposing civil penalties). The parties may consider whether it would be helpful to bifurcate this proceeding, for example to determine what proof would be sufficient to make such a showing, before conducting discovery regarding every shipment potentially involved.

In addition, the parties are encouraged to discuss an amicable resolution of this proceeding. If a settlement is reached, a motion to approve the settlement with a copy of the settlement must be filed.

IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that COSCO's motion to dismiss the proceedings be **DENIED**. It is

FURTHER ORDERED that COSCO shall file its response to the complaint by June 18, 2024. It is

FURTHER ORDERED that as required by the initial order, the parties shall contact the Office of Consumer Affairs and Dispute Resolution Services ("CADRS") and shall submit a joint status report with proposed schedule by July 2, 2024.

Erin M. Wirth
Chief Administrative Law Judge